SUPREME COURT OF THE UNITED STATES.

FOR THE OCTOBER TERM OF 1898.

No. 678.

PHILIP WERLEIN, PLAINTIFF IN ERROR,

versus

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

John Klein having obtained a judgment in the *United States Circuit Court for the Eastern* District of Louisiana, in suit No. 7801 of the docket of that court, seized under a writ of *fieri facias* the property in question in this case.

The city of New Orleans, claiming the property seized, *enjoined the sale* of the property on various grounds in a suit *in the Circuit Court of the United States* in a cause entitled City of New Orleans vs. John Klein, No. 8461 of the docket of the Court.

The injunction suit was tried and the decision was adverse to the city of New Orleans and in favor of John Klein.

The property was then sold by the U. S. Marshal and has been held for nearly *twenty years by the plaintiff in*

error in this case by virtue of said judgment and marshal's sale.

About seventeen years after the title to the property has vested in the plaintiff in error, the city of New Orleans brought the present suit, alleging that the property was dedicated to public use and that the city of New Orleans was entitled to the use thereof, and entitled to the recovery of the property.

The defence made was that the plaintiff in error held title to the property under and by virtue of the Constitution and laws of the United States, and under and by virtue of the judgments of the Circuit Court of the United States.

The Supreme Court of Louisiana, directly in their opinion in this case, nullify and avoid the effect and force of the judgments of the United States Circuit Court, which are swept away as if entitled to no weight whatever.

The Federal question is raised whether force and effect shall be given in a State court to a final judgment and a title to a sale under a final judgment both of which were rendered under the Constitution and laws of the United States by a court of the United States.

The question is raised by exception and by our bill of exceptions in the lower court. It is also in our assignment of errors in the State Supreme Court.

The judgment of the State Supreme Court in this case shows that the federal question *has been urged and passed upon adversely*. City of New Orleans vs. Werlein, 50 An—.24 Southern Reporter, 232.

Argument.

To decide whether this cause contains a federal question your Honors would have to decide whether the judgment of the United States Circuit Court, the effect of which has been annulled by the State Supreme Court, was *res judicata* or not.

The cases quoted by the learned counsel for the city of New Orleans are not applicable.

This Court has repeatedly decided that where a right or immunity is set up under and by virtue of a judgment of a court of the United States and the decision of the State court is against such right or immunity a case is presented for removal and review by writ of error to the Supreme Court of the United States.

Mr. Justice Bradley says in *Dupasseur vs. Rochereau*, 21 Wal. 134:

"Where a State Court refuses to give effect to the "judgment of a Court of the United States rendered upon "the point in dispute, and with jurisdiction of the case "of the parties, a question is undoubtedly raised which, "under the act of 1867, may be brought to this Court for "revision.

"The case would be one in which a title or right is "claimed under an authority exercised under the United "States, and the decision is against the title or right set "up.

"It would thus be a case arising under the laws of the "United States establishing the Circuit Court and vesting "it with jurisdiction; and hence it would be within the "the judicial power of the United States as defined by the "Constitution; and it is clearly within the chart of appel-"late power given to this Court over cases arising in and "decided by the State courts" (21 Wal. 134).

The same question was decided by this Court in the case of the Crescent City Live Stock Co. vs. Butchers Union, 120 U. S. 146. In that case the Court, Mr. Justice Matthews speaking for the Court, says:

"It is argued by counsel for the defendant in error "that this does not embrace a Federal question; that the "effect to be given to a judgment or decree of the Circuit "Court of the United States, sitting in Louisiana by the "courts of that State, is to be determined by the law of

"Louisiana, or by some principle of general law as to "which the decision of the State court is final; and that "the ruling in question did not deprive the plaintiffs in "error of 'any privilege or immunity specially set up or "claimed under the Constitution or laws of the United "States.' But this is an error. The ques ion whether "a State court has given due effect to the judgment of a "court of the United States is a question arising under the "Constitution and laws of the United States, and comes "within the jurisdiction of the Federal courts by proper "process, although, as was said by this court in Dupasseur "vs. Rochereau, 21 Wall. 130, 135, 'No higher sanctity or "effect can be claimed for the judgment of the Circuit "Court of the United States rendered in such a case, un-"der such circumstances, than is due to the judgments of "the State courts in a like case and under simi-"lar circumstances.' Embry vs. Palmer, 107 "U. S. 3. It may be conceded, then, that the "judgment and decrees of the Circuit Court of the United "States, sitting in a particular State, in the courts of that "State, are to be accorded such effect, and such effect "only, as would be accorded in similar circumstances to "the judgments and decrees of a State tribunal of "equal authority. But it is within the jurisdiction of this "Court to determine, in this case, whether such due "effect has been given by the Supreme Court of Louisi-"ana to the decrees of the Circuit Court of the United "States here drawn in question."

This Court through Mr. Justice Shiras, in the case of Central National Bank vs. Stevens, 169 U. S. 460, announces the same opinion:

"Whether due effect has been given by a State Court "to a judgment or decree of a court of the United States "is a federal question within the jurisdiction of this Court "on a writ of error to the Supreme Court of theState."

Central National Bank vs. Stevens, 169 U. S. 460.

II.

Counsel for defendant in error next contends that "when the decision is made on settled pre-existing rules of general jurisprudence, the case can not be brought to this Court for review." But the general jurisprudence of this Court is very much against him. This is too clearly a federal question to admit of argument.

How are your Honors to decide, for instance whether the judgment is *res judicata* not only as to John Klein, but also as to his privy, Philip Werlein, the plaintiff in error, without passing upon the merits of the case?

Fleitas vs. Meraux, 47 An. (La.) 235.

How can you decide that the dismissal of the city's bill in chancery enjoining the sale of the property purchased by the plaintiff in error is a determination of the merits unless made "without prejudice," without passing upon the merits of the case?

Durant vs. Essex, 7 Wal. 107.

Case vs. Beauregard, 101 U. S. 555.

City Bank vs. Walden, 101 U. S. 688.

Fleitas vs. Meraux, 47 An. 241.

The single question for this court to decide in this case is, does the judgment of the United States Circuit Court and the marshal's sale vest the property in controversy in the plaintiff. The decision of the State court is against the plaintiff in error, holding the property under the authority of the judgment of a court of the United States.

Respectfully submitted,

EDWIN T. MERRICK,

Of Counsel.

No. 189.
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189

Filed Feb. 23, 1900.

Supreme Court of the United States,

October Term, 1898.

No. 678.

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vs.

THE CITY OF NEW ORLEANS.

In Error to the Supreme Court of Louisiana.

BRIEF OF PLAINTIFF IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

I.

Andrew C. Lewis, by an adjudication at a marshal's sale, made on August 21st, 1878, in the suit of John Klein vs. City of New Orleans, No. 7,801 of the docket of the Circuit Court of the United States for the Eastern District of Louisiana, purchased the property in contest in this case, viz:

A certain portion of ground, together with the improvements thereon, situated in the first district of this city, in the square bounded by Poydras, Perdido, Carroll and Baronne Streets, and measuring 150 feet, 6 inches front on Baronne Street, 57 feet, 5 inches front on Perdido Street, 150 feet, 4⅜ inches on Carroll Street, and 57 feet, 5 inches

and 1 line on the line nearest Poydras Street; (p. 76) but subject to the usufruct existing in favor of the New Orleans & Carrollton Railroad Company. (p. 73.)

2. Lewis sold this property to Edward R. Hogan, November 29th, 1878. (p. 45.)

3. Hogan sold it on February 8th, 1879, to Bertrand Adoue. (p. 47.)

4. Bertrand Adoue sold it to P. and P. P. Werlein. (p. 48).

(*a*) On reference to this act (p. 48) the Court will see that other vendors join in the sale. In fact, Adoue purchased the property for Herman Zuberbier, Mrs. Baker and Mrs. Blaffer, Mrs. Vogel, Mrs. Adoue, Mrs. Touchemoulin and Jules E. Schneider.

The act states that at the time of the purchase, the *building* stood on said property known as the National Theatre and belonged to these people (p. 50) who held the land under a contract with the City of New Orleans (p. 43.)

(*b*) They also had purchased the usufruct of the New Orleans & Carrollton Railroad Co. (p. 40).

5. The heirs of P. P. Werlein transferred all their interest to Philip Werlein on August 7th, 1886. (p. 52).

6. Philip Werlin, whose name appears in this record as the plaintiff in error, died on November 6th, 1899, and his widow, Bettie P. Werlein, has been appointed testamentary executrix of his estate and has been made a party to this cause.

II.

The plaintiff in error, or rather, his representative, therefore stands in this Court as a subsequent purchaser of the real estate in contest, from Andrew C. Lewis, who purchased the property from the marshal's sale in suit No. 7,801, entitled John Klein vs. The City of New Orleans.

There is no question raised in this record at *the present time concerning the validity* of John Klein's judgment.

But when this property was seized by the marshal in the suit of Klein vs. New Orleans, the *City of New Orleans* on April 20th, 1878, *sued out an injunction against the sale* in a suit entitled City of New Orleans vs. John Klein, No. 8,461 of the docket of the Circuit Court of the United States for the Eastern District of Louisiana (pp. 55, 56 and 57.)

The city's grounds of complaint were:

That Klein had caused his judgment to be registered in the office of the administrator of public accounts according to the provisions of Act 5 of 1870, extra session, and that said act prohibited the issuance of a *fieri facias* upon a judgment so registered;

That Klein was no longer the owner of said judgment but had sold the same to the firm of Lessassier & Binder

And that the writ was for a larger sum than the balance due on said judgment.

This case was heard on the city's application for an injunction *pendente lite* and the restraining order and preliminary injunction issued April 25th, 1878.

Motion to dissolve the injunction was made and on June 19th, 1878, the cause was tried and submitted on the bill, answers and exhibits, and the following decree was rendered:

CITY OF NEW ORLEANS
vs.
JOHN KLIEN. } No. 8,461.

This cause came on to be heard at the present term.

On consideration thereof it is ordered, adjudged and decreed that the interlocutory injunction be dissolved, and injunction refused, and complainant's bill of complaint dismissed with costs.

June 19th, 1878.

(Signed) EDWARD C. BILLINGS, *Judge.*

The property in question was then advertised and sold by the marshal, as I have stated, under Klein's judgment

and bought in by Andrew C. Lewis, the *author* of plaintiff in error, as I have stated, on August 21st, 1878.

More than *sixteen and a half years after this* sale and *nearly seventeen years* after the adverse decision of the United States Circuit Court in the suit of the City of New Orleans vs. John Klein, No. 8,461, and after more than sixteen years of peaceful possession, and after receiving taxes thereon for this period, the City of New Orleans filed the present suit in the Civil District Court for the Parish of Orleans, claiming that the sale by the United States Marshal to Andrew C. Lewis was "absolutely null and void, and that no title or right whatever in or to said property passed by said sale to Andrew C. Lewis or to the defendant herein, who claims through mesne (*sic*) conveyances from Andrew C. Lewis," and alleging that the property was dedicated to public use and unsusceptible of alienation or of private ownership or of private possession, and that Werlein's possession was illegal and in bad faith.

The City of New Orleans claimed also in said petition that it was invested by the law with administration and possession of property for the public benefit. (pp. 1 and 2).

To this petition the plaintiff in error excepted that the judgment in the suit of Klein vs. The City of New Orleans No. 7,801 of the Circuit Court of the United States, and the judgment rendered in the injunction of the City of New Orleans vs. John Klein, No. 8,461 of the docket of the United States Circuit Court, constituted *res judicata* and that the sale thereunder was valid and binding on the city. (pp. 3 and 4).

And in case the exceptions and plea of *res judicata* should be overruled the plaintiff in error answered and pleaded estoppel on the part of the City by the suits pleaded as *res judicata*, and also in assessing the property to him and collecting taxes, etc. (For the answer of plaintiff in error, see pages 4, 5 and 6).

The exception and plea of *res judicata* was argued and submitted to the Court and was overruled. (P. 6).

The City of New Orleans, on June 27th, 1895, filed a supplemental and amended petition, in which it attempted to plead a judgment of the Supreme Court of the State as *res judicata* against Philip Werlein.

This amendment was met by an exception that it changed the issue—the original suit being an alleged dedication and not on a judgment.

This exception was sustained and the City's amended and supplemental petition was dismissed (p. 12) under the settled jurisprudence of Louisiana. 7 An. 334, Deniston vs. Payne.

The case was tried on the merits and from an adverse decision Philip Werlein appealed to the Supreme Court of Louisiana and the judgment of the court *a qua* sued out a writ of error to this Court.

The evidence shows that the property in question was always used by the City for private purposes and never as a public place or square for which purpose the City claimed it was dedicated.

A suit was brought in 1841 against the New Orleans & Carrollton railroad, to whom the property was leased, the judgment in which was attempted pleaded as *res judicata* by the City of New Orleans as already stated, and in the very judgment referred to the lease of the property to the railroad company was recognized.

It was afterwards leased to Magdalen Clausen in 1864, and in 1866 the railroad company sold its entire interest described as a right of occupany, to Christian Schneider and others, which sale was made subject to the Clausen lease.

The purchasers *built a theatre* on the property and in May, 1867, entered into a contract with the city, whereby the latter agreed to purchase the building at the expiration of the right of occupancy.

Errors Assigned.

The errors assigned are, I do not give them in the order in which they appear in the transcript (pp. 128 to 134), substantially as follows:

First.

That, as plaintiff in error constitutionally holds title to the property in controversy by virtue of a judgment, execution and marshal's sale in the suit of John Klein vs. New Orleans, No. 7,801 of the Circuit Court of the United States, and as the City of New Orleans had enjoined the sale of the proprty in the same Court in suit entitled City of New Orleans vs. John Klein, No. 8,461, and as said injunction suit was on final hearing decreed to be dismissed, and as said judgments have never been appealed from nor reversed nor annulled by any action brought to annul said judgments, that both and each of said judgments were entitled to the force and effect of *res judicata* under the constitution and laws of the United States, and that the lower State court erred against the constitution and laws of the United States in refusing to recognize the title of plaintiff in error to said property under said judgments.

Second.

That plaintiff in error and his authors legally hold said title to said property under the two judgments already mentioned of the Circuit Courts of the United States and marshal's deed aforesaid, which property never had been used for anything but private purposes; that the City of New Orleans left the plaintiff in error in undisturbed and recognized possession of said property, assessing the same in the name of plaintiff in error and his authors, and admitted in judicial proceedings the ownership of plaintiff in error, the Court erred in violation of the Constitution of the United States in not holding the City of New Orleans estopped by its said acts from contesting his title.

THIRD.

That the lower court erred in violation of the constitution and laws of the United States and against the authority of the Courts of the United States in rejecting, on the trial of the plea of *res judicata* and estoppel, the evidence of title of plaintiff in error consisting of the suits, and proceedings had in the United States Circuit Court, entitled John Klein vs. City of New Orleans, No. 7,801, and City of New Orleans vs. John Klein, No. 8,461, of the docket of said Court, and the marshal's deed, and the transfer through the various owners to the plaintiff in error.

FOURTH.

That the lower court erred in violation of the Constitution and laws of the United States in rejecting, on the trial of the plea of estoppel in this cause, the exemplifications of the suits of John Klein vs. City of New Orleans, and City of New Orleans vs. John Klein, Nos. 7,801 and 8461, respectively of the docket of the Circuit Court of the United States for the Fifth Court and Eastern District of Louisiana, and the different deeds from and including the deed of the United States Marshal, in suit No. 7801 of the docket of said Circuit Court, down to and inclusive of the evidences of title of plaintiff in error.

POINTS OF FACT OR LAW.

I.

The plaintiff in error holds the real estate in question by virtue of the two judgments referred to, viz:

The judgment of the United States Circuit Court for the Eastern District of Louisiana, in the cause entitled John Klein vs. the City of New Orleans, No. 7,801, and the judgment of the Circuit Court of the United States in the chancery suit entitled New Orleans against John Klein, in which a preliminary injunction was sued out by the City of New Orleans *to prevent the sale of this property*, was on final hearing dismissed.

These two judgments have never been appealed from, and no action of nullity has ever been brought to set them aside.

The effect of the dismissal of the city's injunction suit was to permit the sale of the property enjoined to proceed.

The United States Marshal acting under the authority of the federal tribunals, sold the property to the authors of the plaintiff in error and delivered them possession.

Sixteen years afterwards, the same plaintiff sues for possession of the property without paying any regard to the two judgments of the United States Circuit Court, and gets it if the judgments of the lower Court is to remain.

The city has not shown that any greater rights have accrued to it since its first suit. Nor has it shown that its circumstances have changed. If, as alleged in its second suit, it is suing as the administrator for the public benefit in 1895; there is not a syllable in the record to show that the city sued or had the right to sue in any other capacity in 1878!

In fact, the bill of complaint in the suit of the City of New Orleans vs. John Klein, No. 8,461 of the docket of the United States Circuit Court, does not allege whether the city sued as owner or as manager of the property for the public benefit, but is that a presumption that the city did not sue in the only capacity in which she had the right to sue in 1878?

II.

I cannot bring myself to the conclusion that the City of New Orleans can now entirely disregard the *fi fa* and sale thereunder of its property in Klein vs. New Orleans—or the legal effect of the dismissal of its bill to enjoin that sale.

There is no question that the decisions in the two cases referred to apply as *res judicata* and estoppel as well to the plaintiff in error, the executrix of Philip Werlein,

deceased, as to John Klein or A. C. Lewis, the original purchaser.

The final judgment of a court of competent jurisdiction is *res judicata* between the parties, their privies, assigns and *ayantes causes.*"

47 La. An. 232, Fleitas, Wife vs. Moraux.

3 La. An. 230, Delabigarre vs. Second Municipality.

8 La. An. 126, Johnson vs. Weld.

34 La. An. 814, Heroman vs. Louisiana Institute.

46 La. An. 1098, McNeely vs. Hyde.

43 La. An. 924, Broussard vs Broussard.

169 U. S. 248, Dull vs. Blackman.

167 U. S. 398, New Orleans vs. Citizens Bank.

III.

It will, I think, hardly be questioned that the decree rendered on the merits in the suit of the City of New Orleans vs. John Klein, in suit 8,461 dismissing the city's bill of complaint, was a *final* judgment.

This Court says in 101 U. S. 556, "we decided that the decree, absolute in its terms, dismissing the bill on the merits, was a final determination of the controversy, and constituted a bar to any further litigation of the same subject between the same parties."

101 U. S. 556, Durant vs. Essex.

In another case in the same volume, Mr. Justice Strong says, speaking of a similar decree:

"Thus it appears the bill exhibited all that was necessary to give to the Court, sitting as a Court of equity, complete jurisdiction over the subject of the controversy between the parties, and all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. We regarded the case and treated it as requiring an adjudication upon the com-

plainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion *that the case was erroneously decided*, it would still be *res judicata*, a bar to the complainants, a protection to the defendants. It would be idle, therefore, to reconsider the question whether the bank has a lien upon the property he seeks to charge, or whether there had been a trust in the bank's favor."

101 U. S. 692, Case vs. Beauregard.

"A decree dismissing a bill in an equity suit in the Circuit Court of the United States, which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties."

7 Wal. 107, Durant vs. Essex Co.

"Dismissing a bill is a determination of the merits unless made "without prejudice."

Story's Equity Pleading.

47 A. 241, Fleitas, Wife, vs. Mereaux.

1 A. 46, City Bank of New Orleans vs. Walden.

IV.

It cannot be disputed that the sale being allowed to proceed and the city's injunction dismissed, the property was legally sold. Not only what was set up by the city to stop the sale, but every question that might have been set up was concluded by the decree.

"There are many general expressions in the books to the effect that the judgment of the court of competent jurisdiction is final and conclusive upon the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause and might have had determined."

Black on Judgments, Sec. 731.

Interest reipublicae finis litium sit. After one determination of a suit on the merits, the controversy cannot be reopened to hear an additional reason which before existed and was within the knowledge of the party in support of the same cause of action.

As Mr. Justice Field says in Davis vs. Brown:

"So far as the demand involved in the action is concerned, the judgment has closed all controversy. Its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it.

"The judgment is not only conclusive as to what was actually determined respecting such *demand, but as to every matter which might have been brought forward and determined respecting it;* and this is all that the languge means which is quoted by counsel from opinions in adjudged cases in seeming consonance with his opinion."

94 U. S. 428, *Davis vs. Brown.*

Mr. Chief Justice Waite announces the same principle in the case of Stout vs. Lye, speaking of the effect of a judgment.

"That was a judgment on the merits of the identical matter now in question and it concluded the "parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to every other *additional matter which might have been offered for that purpose. Cromwell* vs. *County of Sac*, 94 U. S. 351, 352. It is true the mortgagor did not set up as a defense that the bank had no right to take up the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so he is concluded as to all such defences and so are his privies. 103 U. S. 71, *Stout vs. Lye.* (The italics are those of the writer, as are nearly all the italics in quotation in this brief).

A party cannot bring suit upon a certain state of facts and "after dismissal of his action bring another suit against the same party upon the *same state of facts upon a different theory*. The judgment in the first action is a complete estoppel in favor the successful party upon the same state of facts."

171 U. S. 209, Hubbell vs. United States.

The foregoing language was applied by Mr. Justice Brown to patent cases, but I can see no reason why it is not equally applicable to any other judgment.

The City of New Orleans can no more attempt to recover now on a different theory than any other litigant.

The object of the first suit was to stop the sale of certain property which the city claimed an interest in stopping.

The object of the second suit is to recover the sold property, and the city has now only the same right that she then had namely that of the proper person to look after the interests of the public.

The contest is about the identical lot of ground and the opinion of this Court in the case of the Last Chance Mining Company vs. Tyler Mining Company, 157 U. S. 683, quoted by Mr. Justice White, in New Orleans vs. Citizens' Bank, does not seem out of place here:

"The law in respect to estoppel by judgment is well settled and the only difficulty lies in the application of the law to the facts."

"The particular matter in controversy in the adverse suit was the *triangular piece of ground which is not the matter in dispute in this action.*"

"The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only to matters which were in fact decided. *Hopkins* vs. *Lee*, 6 Wheat. 109; *Smith* vs. *Kernochen*, 7 How. 198; *Pennington* vs. *Gibson*, 16 How. 65; *Stockton* vs. *Ford*, 18 How. 418; *Washington &c. Steam Packet Co.* vs. *Sickles*, 24 How.

333; *S. C.* 5 Wall. 580; *Lessee of Parish*, vs. *Ferris*, 2 Black 606; *Cromwell* vs. *County of Sack*, 94 U. S. 351; *Davis* vs. *Brown*, 94 U. S. 423; *Russell* vs. *Place*, 94 U. S. 606; *Campbell* vs. *Rankin*, 99 U. S. 261; *Lumber Co.* vs. *Buchtel*, 101 U. S. 638; *Stout* vs. *Lye*, 103 U. S. 66; *Nesbit* vs. *Riverside Independent District*, 144 U. S. 610; *Johnson Co.* vs. *Wharton*, 152 U. S. 252."

"And the law of Louisiana is exactly in accord with the rulings of this Court, for as said by the Supreme Court of Louisiana in *Heroman et al.* vs. *Louisiana Institute of Deaf and Dumb et al.*, 34 La. An. 805, 814:

"No principle of law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not and even if no reasons at all were given the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. Cooley on Const. Lim., p. 47 *et seq.* and the authorities there cited."

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

Bigelow Estoppel, 3rd. edition, outline, pp. lxi, 29, 57, 103.

"The estoppel extends to every material allegation or statement, which having been made on one side and denied on the other, was at issue in the cause, and was determined therein. *Aurora* vs. *West*, 7 Wall, 102; 4 N. Y. 113; 2 (La.) An. 462; 14 (La.) A. 576; 19 L. 318; 5 N. S. 664; 11 M. 607; 14 L. 233; 5 N. S. 170."

V.

From reading the foregoing authorities one would naturally believe, that in order to constitute *res judicata*, it

will suffice that the parties be the same and the object of the action the same.

The Civil Code of Louisiana, 2286, says:

"The authority of the thing adjudged takes place only with respect to what was the object of the judgment."

"The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties and formed by them against each other in the same quality."

1. The object of the first suit of the City of New Orleans was to prevent the sale of the property in question under a judgment of the United States Circuit Court. In the second suit to recover the same property although sold.

2. The cause of action in both suits was the alleged right of the city to protect that property.

3. The demand in first suit was between the City of New Orleans and John Klein. The demand in second suit is between the City of New Orleans and Klein's privies.

The character of the action or the "demand" must always be determined by the prayer of the bill.

1 Rob. (La.) 110, Hood vs. Segrest.

"In order to determine the character of an action, resort must be had to the prayer in the petition for a judgment."

20 (La.) An. 170, Edwards vs. Buller.

Great stress has been laid by our adversaries upon that portion of Article 2286 which says the cause of action must be same.

Our adversaries say that in the first suit, the city sued as owner to prevent the sale, and in the second suit it claims as the proper person to control and administer the property.

We say that if the second position of the city is a correct one, that there is not one word in the bill for injunction in 1878 to show that the city was not then suing in the

same capacity. The city must have stood in judgment, then defending the only rights it had which are the same now as when the first suit was filed.

As to the expression "cause of action," we must not confuse it with the ground or means of action.

"Il ne faut pas confondre la cause de la demande avec les moyens de la prouver. Cette confusion serait un grand erreur. Que faut il donc entendre par la cause de la demande, *causa petendi.* Car le mot est un peu vague. Il importe beaucoup d'en déterminer le sens precis. C'est, dit Neratius, la *cause prochaine de l'action, causa proxima actionis* et non pas l'espèce ou le genre d'action, qu'un plaideur choisit pour demander en justice la chose qu'il reclame; car deux actions differentes peuvent avoir la même cause; la même cause peut produire plusieurs actions. Si *la chose demandée* EST LA MÊME, *la seconde action quoique differente de la première doit donc être repoussée par l'exception de la chose jugée.* 10 Toul. n. 161.

This authority is quoted favorably in 19 La. 326, Plique & Lebau vs. Perret *et al.*

Zachariae defines what is meant by the same cause of action even better than Toullier:

"Deux demandes doivent être considérée comme fondée sur la même cause, bien qu'à l'appui de la seconde ou presente un moyen nouveau, *pris d'une loi dont on avait negligê d'invoqner* les dispositions lors de la premiere, ou que l'on offre la preuve de faits qu'on n'avait pas d'abord articulés." 3 Zach. §769.

And in a note to the same action the learned author quotes:

"Il ne peut évidement être permis de recommencer un procès sur le simple pretexte de nouveaux moyens, soit de fait, soit de droit. Autrement les décisions judiciares n'aurait jamais qu'un caractère provisoire. Req. rej., 16 juillet, 1817, Sir., XVIII; Req. rej., 14 janvier, 1839, Sir.,

XXXIX, 1, 119. *Voy.* aussi Req. rej., 24 fevrier, 1835, Sir., XXXV, 1, 179."

We find this principle declared and applied by the Supreme Court of Louisiana in 40 La. An. 646. The Court said:

"It is too obvious to admit of serious discussion that this judgment absolutely and finally settled as between the Chaffes and Ludeling, the right of the former to require Ludeling to pay off their mortgage debt or to sell the land for the satisfaction thereof. Ludeling has had his day in Court on this issue and was bound to urge all his defenses, and his mouth is closed as to all matters antecedent to the judgment which he urged, or *might have urged* against its rendition.

"In his present petition for injunction, he sets up a multitude of matters, which were either pleaded, or *might have been pleaded* as grounds for denying or qualifying the above absolute judgment, as to all of which the Judge *a quo* suitained the plea of *res judicata;* and we consider his ruling to be clearly correct."

The Court of Appeals of New York said in the case of *Griffin vs. Long Island Railroad Co.*, 102 N. Y., 452.

"The rule is well settled that a former judgment of a Court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and have decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action, either as a matter of claim or defense."

In 22 Wisconsin, 316, Danaher vs. Prentiss, the Court said:

"The rule to be derived from these cases is that the decision of a court of competent jurisdiction, being *res judicata*, is not only conclusive and binding on all other

courts of concurrent jurisdiction as to the subject matter thereby determined, but also as to every other matter which the parties might litigate in the case and which they *might* have decided."

In 45 Ind. 493, Bates vs. Spooner, the Court said:

"Whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest."

"This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, throughout the civilized world."

"The principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated on the case."

VI.

The object of the first suit of the City of New Orleans was to prevent the sale of the property. But the property was sold under the judgment of the courts of the United States.

Under the faith and credit of those judgments the plaintiff in error hold his title.

Are these judgments to be treated as absolute nullities and thus attack collaterally?

As our Court through the late Judge Miller recently said of the effect judgments of the U. S. Courts:

"Besides the jurisdiction to annul judgments conferred by the Code of Practice has no kind of application to the Federal Courts deriving their jurisdiction from the Constitution of the United States.

"*Dupuy vs. Bemiss*, 2 (La.) An. 509; *Stockton vs. Stanbrough*, 3 (La.) An. 390;" * * * , 47 (La.) An. 240; *Fleitas, Wife, vs. Mereaux.*

In the instant case, the sale had been made.

This property had been sold and transferred according to the judgments of the Circuit Court and whatever advant-

age though imprescriptibility might have been then urged to prevent the sale of property dedicated to public use, I submit it is now useless, to invoke to annul judgment regular upon its face in every respect and a valid sale thereunder.

In the Fleitas case 47 (La.) An. 240), is also the following significant language:

"There was also the writ of seizure and sale obtained by Richardson from the United States Court. Thus, the Court was clothed by the removed suit and the seizure and sale it decreed with jurisdiction of the controversy with respect to Mrs. Fleitas' rights under her mortgage judgment and title, and as to Richardson's rights under his mortgage. The jurisdiction was complete as to subject matter and as to the parties.

It is supposed the federal Courts could not pass on any right of Mrs. Fleitas against her husband and his property for restitution of her funds conferred by the laws of Louisiana.

"The answer is, the federal Courts are authorized to determine questions of that nature; that is, to determine the question as to any right claimed under the laws of the United States, even where that right is supposed to conflict with State legislation."

VII.

The idea that the two judgments of the Circuit Courts could be thus ignored, is utterly repugnant to the jurisprudence of Louisiana.

This is shown by analogous cases. For instance it is a well settled principle of our law *that no man will be permitted to injoin a judgment for a ground which he might have urged as a defence to the suit.*

The reason of this principle is that the judgment is *res judicata* for every thing which might have been urged in the case.

"A judgment debtor against whom a final judgment has been rendered cannot enjoin the execution of the judgment on the ground that the mortgage on which the judgment was based had perempted before the judgment was rendered. As to him the judgment is *res judicata.*" 30 (La.) An. 1238, Haynes vs. O'Neil.

"Matters that could have been urged by way of defense, on the original trial of a case, and on appeal from the judgment in the case, afford no grounds for injoining the execution of that judgment."

30 (La.) An. 441, O'Connor et al. vs. Sheriff.

See also 13 (La.) An. 111, Sartorius vs. Dawson.

25 (La.) An. 538, Naughton vs. Drinkgrave et al.

In 26 (La.) An. 34, the Court says:

"There is no principle better settled than that a party is not allowed to arrest an execution on grounds that he might have set up in his original suit."

"Here the party taking the injunction, not only might have set up in the original suit that the Accommodation Bank was not legally incorporated, but did do it. Hence, it is *res judicata.*" 26 (La.) An. 34, Mahan vs. Accommodation Bank.

Again:

"An injunction will not lie, to stay the execution of a of a judgment for the amount of a note given for the price of a tract of land, on the allegation that, since the rendering of the judgment, plaintiff has discovered that the defendant, his vendor, had no title to the land."

"The execution can only be restricted by appeal, or action of nullity or on an allegation of extinguishment by payment, release, confusion, novation or other legal mode."

3 R. 273, Morrison vs. Crooks.

VIII.

There is another rule of Louisiana practice which forbids a party *bringing a second injunction on any ground whatever after the first injunction has been dissolved.*

This is because the dismissal of the first injunction was *res judicata.*

If the City could not have brought a second injunction suit against Klein, how is it she can now bring a suit and take back the property without even annulling the judgments under which its title is sheltered.

The rule that second injunction will not issue after the dismissal of a previous injunction is well settled by Judge Illsley in the case of State vs. Judge of Second Judicial District Court, where many different *causes of action* were set up to use my adversaries mode of expressions, where he says:

"All those objections, if available, *were pleadable in the first injunction suit*, and being, *in the contemplation of law disposed of in the first injunction* cannot be set up as grounds in a second injunction, whereby injunction for those alleged causes was unprovidently and illegally granted by the Judge of the lower court."

20 (La.) An. 522.

And the Court says further: 20 (La.) An. 523).

"All impediments existing when the first injunction was granted were removed by the dissolution of that injunction and the order and writ of seizure and sale were thereby restored to their pristine efficiency, as a necessary logical consequence of the dissolution."

"The decree of this Court which affirmed the judgment dissolving the injunction, cannot be arrested for any of the grounds existing and pleadable when it was granted."

20 La. An. 523, State vs. Judge Second Judicial District Court.

If the City of New Orleans who injoined in 1878 under the only title it then possessed or ever possessed, and if it was judicially estopped by the judgment dismissing its injunction, it could not procure another injunction.

How then can it actually recover property of which it has been judicially divested.

How can the City disregard the force and effect of a decree of court and a judgment and sale thereunder? The City of New Orleans whose rights were the same in 1878 as it now claims they are now absolutely disregard the judgments of the Court and the judicial sale of the property, and as is attempting to take away from the legal owner as if he were a mere trespasser.

Our adversaries appear to think that a judgment contrary to a rule of public order is not *res judicata*, and that therefore a dedication to public use cannot be divested.

This point is disposed of by the decision of Mr. Justice White, then a Judge of the Supreme Court of Louisiana, in 31 (La.) An. 212, Succession of Lebrew. The syllabus reads:

"The binding effect of *res adjudicata* cannot be impaired by the fact that the thing established by it involves a question of public order, and is afterwards found to be wholly untrue."

"The presumption that the thing adjudged is true, is so conclusive, no subsequent discovery can disturb it."

And in the body of the decision, 31 (La.) An. 214, Mr. Justice White, speaking of the contention that there can be no *res judicata* against a rule of public order, quotes the following passage from Demolombe:

"But it may be contended in case of a nullity founded on public order, which a defendant could not renounce, he can consequently urge it in a second suit, although not presented in the first. We reply that the distinction is inadmissible." * * * "Because it is contrary to every principle. What! When a pleader has defended himself by

every means, or even when he has been condemned by default will it be said that the law will presume that he has failed to present his defenses? Certainly not. That which it presumes is that these defenses do not exist."

31 (La.) An. 214, Succession of Lebrew.

Respectfully submitted,

By EDWIN T. MERRICK,

Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 189.

PHILIP WERLEIN, PLAINTIFF IN ERROR,

vs.

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

Brief for Plaintiff in Error in Reply.

I.

My adversary, in his zeal for the interest of New Orleans, overlooks or misunderstands the position of the plaintiff in error entirely.

I do not admit that the question of dedication to public use was not raised in the injunction suit brought by the city in the circuit court of the United States to prevent the sale and actual transfer of title to the property in question in this case.

On the contrary, the title to the property—the ownership of the property—being in question in that case, the question

of dedication to public use was necessarily decided when the injunction was dismissed without reservation.

In other words, the City of New Orleans has not shown and cannot show that the rights which it claims to possess are any different from those it possessed twenty-two years ago, when it attempted to prevent the transfer of ownership of this property by the marshal's sale.

The statement of my adversary, "It is admitted by counsel for plaintiff in error that the question of dedication to public use," is not correct. That question certainly was incidental to ownership of the property, and I will show the court that under the law of Louisiana something more was in contest than the mere prevention of the marshal from selling the *city's individual interest*, as my adversary would express it.

II.

But we do not admit that *as a fact the property was dedicated to public use.* We only say that if it was dedicated to public use the ownership vested in the plaintiff in error just the same.

Stress is laid on the fact that the writ of *fi. fa.* seizes "all the right, title, and interest of the City of New Orleans," and that the writ does not seize the improvements and property itself.

My adversary neglects to inform this court that this is a proper form of making a seizure in Louisiana:

"The seizure of *all the right, title, and interest* of the debtor in and to the thing seized is a sufficient seizure of the thing itself."

11 A., 705, *Davis vs. Carroll.*

"Where a sheriff seizes, advertises for sale, and sells" all the right, title, and interest of the debtor in a lot of ground owned by him, but which was encumbered with mort-

gages, it must be considered as a seizure and sale of the property itself and not of the contingent rights of the debtor to so much of the property as may remain after the mortgages are satisfied.

1 A. (La.), 426, *Trudeau et al. vs. McVicar.*

III.

As a matter of fact, there is no good and sufficient proof in this record that the property in question was dedicated to public use.

The testimony shows that sixty-six years ago the boys used to shoot snipe on the so-called public square; that it was a goose pond (R., 12 and 13); that it was used also, in 1837, by a railroad company (R., 13); that afterwards it was used for a German theater (R., 15).

That at one period, shortly after 1835, a drug store was there (R., 17); at another time, a church (R., 19, and map, R., 81).

Even had some sort of dedication to public use actually been carried out, which is denied, our law is not so rigorous as our adversary contends.

Our supreme court has held that the abandonment of a public road for more than thirty years, during which time the possession of individuals has been undisturbed, prevents further subjection to public use.

3 A., 482, —— —— *et al. vs. Arnault et al.*

In this case, as stated in my original brief, the city has collected thousands of dollars for taxes (R., 91) from plaintiff in error and his authors, and so has the State (R., 90), and the city, when it served its convenience to do so, has pleaded estoppel against the plaintiff in error when he disputed the amount of an assessment (R., 32).

There is no justice nor honor in the position now assumed by the city, and the question now submitted to this court is whether it will give force and effect to the judgments of its subordinate courts which stand today unappealed from, not annulled by any direct action.

Respectfully submitted.

EDWIN T. MERRICK,
Of Counsel.